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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972.

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 72-~~536~~ 563

KEITH B. McKY,

Petitioner,

vs.

UNION BANK AND TRUST COMPANY OF HELENA, MONTANA, as Executor of the Estate of Arnold C. Schueren, Deceased,

Respondent.

BRIEF OF RESPONDENT UNION BANK AND TRUST COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Frank G. Uriell
Ellis A. Ballard
69 W. Washington St.
Chicago, Illinois 60602
Attorneys for
Union Bank and Trust
Company of Helena,
Montana, Executor of
the Estate of Arnold
C. Schueren, deceased,
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Respondent submits that the petition for certiorari should be denied for the following reasons:

(1) Petitioner has already been denied certiorari in Keith B. McKy v. Olga Hochfelder, et al.[1/] - a case closely

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1/ No. 72-235, cert. den. Oct. 3, 1972 41 U.S. Law Week 3187.

related to this, wherein Petitioner was directed by the Seventh Circuit to allow the so-called "escrow claims" in the pending receivership proceedings. Securities & Exch. Com'n v. First Securities Co. of Chicago, 463 F.2d 981 (7th Cir. 1972). In the instant case the Seventh Circuit expressly relied on its holding and reasoning with respect to the escrow claims in concluding that this Respondent's claims should also be allowed. We respectfully submit that the earlier denial was entirely proper. There was no basis for certiorari in that case and there is likewise none here.

(2) Petitioner argues that the instant case is different because certain powers of attorney are here allegedly involved that were not present in the earlier case. However, Petitioner neglects to point out the complete irrelevance of those powers

of attorney here: they do not figure in any of the transactions on which Respondent relies for establishing its claim. Other than Nay - the defaulting president, no one at First Securities ever relied on the powers of attorney in question or even knew of their existence at any time from the founding of the company until its demise. Nay never claimed to be acting under those powers at any time during his association with First Securities; and the grantor of those powers - Arnold C. Schueren - never thought that Nay was acting under those powers, either. These facts are clearly spelled out in the opinion of the Seventh Circuit, forming the basis of its conclusion that the powers of attorney were irrelevant, here.

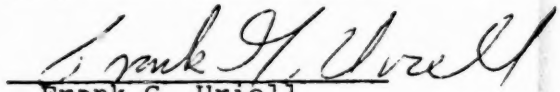
(3) Petitioner's contention that this case should be ruled by Rosen v. Harde, 238 App. Div. 622, 265 N.Y. Supp. 154

(1933) is clearly without merit. That was a 1933 New York Appellate Division case decided before the passage of the Securities Exchange Act of 1934. If ever it was good law, it no longer is. More important, the facts in Rosen v. Harde are fundamentally different from those here. There is every reason to think that - on the facts referred to in the preceding paragraph - the Rosen v. Harde court would have decided this case the same way the Seventh Circuit did.

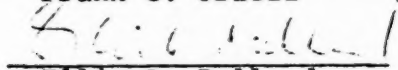
(4) Finally, Petitioner's efforts to distinguish Blackburn v. Witter, 201, Cal. App. 2d 518, 19 Cal. Rptr. 842 (1962) are not successful. Contrary to the Petitioner's contentions, that case does not turn on any peculiarities of California law. It turns instead - as this one does - on Sections 261 and 262 of the RESTATEMENT (SECOND) AGENCY (1958) which sections state well-recognized common law agency principles that are nowhere

in doubt. The contention that the Seventh Circuit misapplied Illinois law is, we believe, a wholly groundless contention.

Respectfully submitted,



Frank G. Uriell



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Attorneys for
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Certificate of Service

I hereby certify that the attached brief has been served by mail on all parties entitled to service by depositing three copies in a United States mailbox, with first class postage prepaid, addressed to counsel of record at their post office address.

Frank G. Uriell